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FEDERAL LEGISLATION

As of June 15, this session the Congress has enacted no legislation dealing specifically with administrative procedure. However, it has dealt with the problem of executive reorganization.

Reorganization Plans. Acting in pursuance of the authority conferred by the Reorganization Act of 1949 (Public Law No. 109, 81st Congress, June 20, 1949), the President on March 13, 1950, transmitted to the Congress twenty-one plans for reorganization of agencies of the Executive Branch. As explained in the message which accompanied the twenty-one plans, they were designed to accomplish the following purposes:

Departments. Plans 1-6 relate to the Departments of the Treasury, Justice, Interior, Agriculture, Commerce, and Labor. They transfer to the respective Department heads the functions of other officers and agencies of the Departments. They permit each Department head to authorize the functions vested in him to be performed by any officer, agency, or employee of the Department. They thus seek to eliminate the patchwork exceptions that now exist to the concentration of authority in Department heads. Two classes of functions are excluded from transfer to the Department

CONTENTS

Federal Legislation	61
Prosecutor-Judge Problem	63
Supreme Court	68
Procedure Act Cases	73
Other Federal Cases	76
State Cases	87
State Legislation	88
Section Activities	90

heads—the functions of the hearing examiners appointed under the Administrative Procedure Act and the functions of government corporations in the Departments.

“Independent” boards. Plans 7-13 relate to the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, and the Civil Aeronautics Board. These plans are designed to strengthen the internal administration of these bodies by making the Chairman, rather than the Commission or Board as a whole, responsible for day-to-day administration. Accordingly, responsibility is vested in the Chairman, in each case, for appointment and supervision of personnel, for distribution of business among such personnel and administrative units, and for the use and expenditure of funds. Also, the function of designating the Chairman of these bodies is vested in the President in those instances where this function is not already a Presidential one.

Thus in regard to the regulatory commissions, the plans distinguish between two groups of functions necessary to the conduct of these agencies. One group includes the

substantive aspects of regulation—that is, the determination of policies, the formulation and issuance of rules, and the adjudication of cases. All these functions are left in the board or commission as a whole. The other group of functions comprises the direction and internal administration of complex staff organizations. These responsibilities are transferred to the chairmen of the agencies, to be discharged in accordance with policies which the commissions may establish.

Labor Board. Probably the most controversial change was that proposed by Plan 12, which was rejected by the Senate on May 11. It would have terminated the separation of the functions of prosecutor and judge in the National Labor Relations Board set up under the Taft-Hartley Act. Concentration of functions was proposed to be established once more in the Board by transferring to it and its Chairman the functions of the General Counsel and by abolishing the statutory office of the General Counsel. It thus went further than the recommendations of the Hoover Commission. The latter Commission's "Task Force" Report on Regulatory Commissions expressed some dissatisfaction with the independent position of the General Counsel. But neither the Task Force nor the Commission recommended revision as drastic as that under Plan 12.

Maritime Commission. Of the remaining plans, Plan 21 is most significant. It in effect abolishes the Maritime Commission and transfers its functions to the Department of Commerce, where they will be administered by a three-member Maritime Board and a Maritime Administration. The former will regulate rates and grant ship subsidies under policies laid down by

the Secretary of Commerce. The latter will take over the building, selling, and chartering of vessels. As stated in the President's message, while an independent commission is an appropriate instrument for the performance of the regulatory functions of the Maritime Commission, such an agency is not the type required to provide strong and efficient administration of the large operating programs heretofore entrusted to the Commission.

Other plans rejected. Under the provisions of the Reorganization Act of 1949, reorganization plans submitted by the President become operative with the full effect of law in sixty calendar days of continuous session if neither House of Congress disapproves. The adverse vote of either House or Senate kills a plan. Of the twenty-one plans submitted on March 13, the following were rejected: Plan 1, respecting the Treasury Department; Plan 4, respecting the Agriculture Department; Plan 7, respecting the Interstate Commerce Commission; Plan 11, respecting the Federal Communications Commission; and Plan 12, respecting the National Labor Relations Board. The remaining plans became effective on May 24, 1950 (see 15 F. R. 3173 *et seq.*).

New plans. In addition to the twenty-one reorganization plans described above, two groups of plans have since been transmitted by the President to Congress and are currently under consideration by both Houses. On May 9 Plans 22-25 were submitted. Plan 22 transfers the Federal National Mortgage Association from the Reconstruction Finance Corporation to the Housing and Home Finance Agency, in accordance with the specific recommendation of the Hoover Commission. Plan 23 transfers

from the Reconstruction Finance Corporation to the Housing and Home Finance Agency the lending functions of the Government with respect to the production and distribution of prefabricated houses and components. Plan 24 would have transferred the Reconstruction Finance Corporation to the Department of Commerce to be administered as a corporate entity by its Board of Directors and officers but subject to the supervision, coordination, and policy guidance of the Secretary of Commerce; but it was rejected by the Senate on July 6. Plan 25 transfers the function of the National Security Resources Board from the Board to the Chairman and makes the Board advisory to the Chairman.

On May 31 the President submitted to Congress Plans 26 and 27, to become effective on July 31 unless rejected by congressional action. Plan 26, relating to the Treasury Department, provides reorganizations identical with those contained in Plan 1, except that the functions of the Comptroller of the Currency—the transfer of which to the Secretary of the Treasury had been the reason for the Senate's disapproval of that Plan—are not affected. As in the first plan, the functions of other officers and agencies of the Department are transferred to the Secretary of the Treasury, with the exception of functions vested in hearing examiners by the Administrative Procedure Act. Plan 27 would have created a Department of Health, Education, and Security as one of the executive departments of the Government and transfer to it the functions and constituent units of the Federal Security Agency; but it was rejected by the House of Representatives on July 10.

PROSECUTOR-JUDGE PROBLEM

One of the features of most federal regulatory agencies is the union of the functions of prosecutor and judge. It blends within a single agency both the power to issue complaints and the power to determine whether the alleged facts which give rise to the complaint exist to such a degree as to justify the imposition of a penalty or some other legal consequence. For example, agencies like the Federal Trade Commission perform a task consisting of these elements: first, they determine what constitutes a violation of a broad legislative standard such as "unfair methods of competition"; second, they discover through the methods of a prosecutor that a person has violated this standard; and, third, they issue an order restraining the conduct thus found objectionable. This concentration of functions in one agency is widely believed to violate what the Lord Chancellor's Committee on Ministers' Powers termed the "first and most fundamental principle of natural justice." But it is true that the agency in performing these functions frequently acts through different subordinate officials. "An administrative agency is not one man or a few men but many", said the Attorney General's Committee on Administrative Procedure in 1941, so that "it is important * * * not to make the mistake of conceiving of an agency as a collective person and concluding that, because the agency initiates action and renders decision thereafter, the same person is doing both" (Report 55). Yet, even if he could keep this caveat in mind, "the litigant often feels that, in this combination of functions within a single tribunal or agency, he has lost all opportu-

nity to argue his case to an unbiased official and that he has been deprived of safeguards he has been taught to revere" (Minority Views, *id.* 204).

Proposed Solutions. The President's Committee on Administrative Management, which reported in 1937, proposed a complete and drastic program of separation of functions as a means of solving the procedural problems growing out of the merger of the powers of prosecutor and judge. Its proposal was that agencies with judicial functions should be divided into an administrative section and a judicial section. The Administrative Section would be designed "to formulate rules, initiate action, investigate complaints . . . [to] do all the purely administrative or sub-legislative work now done by the commissions—in short, all the work which is not essentially judicial in nature." The Judicial Section would "sit as an impartial independent body to make decisions affecting the public interest and private rights."

A program for complete separation, with adjudication by wholly independent bodies, was endorsed by the minority of the Attorney General's Committee, at least insofar as agencies with prosecuting functions were concerned. The majority of that Committee, however, although recognizing that the commingling of functions of investigation or advocacy with the functions of deciding was undesirable, nevertheless thought that the disadvantages of complete separation, in decreased administrative efficiency and also in the "sheer multiplication of separate governmental organizations" more than counterbalanced the advantages claimed. This was especially true, they said, since the desired objective could be adequately secured by a purely internal separation of functions,

which would isolate those in the agency who are engaged in the adjudicating activity.

The Committee's recommendations on this point, as summarized by Professor Davis, involved six main features: (1) strengthening the power and position of the hearing officer; (2) making the hearing officer independent of agency control; (3) rejecting the idea of complete separation in favor of the idea of internal separation; (4) empowering the hearing officer to make initial decisions subject to agency review; (5) permitting a continuation of combined functions at the level of agency heads; and (6) eliminating the reviewing staffs. *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 389, 397.

These recommendations, in addition to providing for internal separation of functions, were intended to go a long way toward meeting the problem of the first *Morgan* case (298 U. S. 468). As stated by the Attorney General's Committee, "the recommendations * * * looking toward the creation of the office of hearing commissioners to hear and initially to decide cases which go to formal proceedings, together with the recommendations looking toward a greater delegation of administrative functions within the agencies, would insure internal but nevertheless real and actual separation of the adjudicating and the prosecuting or investigating functions. The person who heard and weighed the evidence, who made the initial findings of fact and the initial order in each case, would be entirely different from those persons who had investigated the case and presented it in formal proceedings. He would have had no connection with the initiation or prosecution of the case. His decision would stand unless either the attorney for the agency or the attorney for

the private party were able to demonstrate through exceptions, appeal, and argument before the agency heads that his findings or conclusions were in error" (Report 55).

Administrative Procedure Act.—The Administrative Procedure Act follows the approach of the majority of the Attorney General's Committee in its attempt to deal with the problem of the concentration of functions. Section 5(c) requires each agency, in deciding the adjudicatory cases subject to section 5, to establish an internal separation of functions between the officials who hear and decide and those who investigate or prosecute. Such "internal" separation is achieved, first of all, by setting up within each agency a corps of semi-independent hearing examiners (appointed under section 11 of the Act) to whom are to be assigned the initial adjudicating functions of the agency under sections 7 and 8. Such examiners are to perform no duties inconsistent with their duties and responsibilities as examiners. To assure equality of participation and to prevent attempts to reduce examiners who are in disfavor to inactivity, the agencies are required to assign examiners to cases in rotation so far as practicable. The central purpose of these provisions of the Act is to guarantee the judicial impartiality of the hearing officer by limiting his duties to those consistent with the performance of the adjudicatory function and by making his position a more secure one.

Much of the criticism which has been directed against administrative adjudications has been based upon the fact that the officers before whom hearings have been held have often had little responsibility in the decision process. The Administrative Procedure Act

seeks to correct this situation, first by conferring broad powers on the hearing officer by section 7(b), which is designed to ensure "that the presiding officer or officers will perform a real function rather than serve merely as notaries or policemen." (*APA, Legislative History*, S. Doc. 248, 79th Cong., 269). In addition, the hearing officer is given a real part to play in the decision process. Section 5(c) provides that such officers must make the initial or recommended decision required by section 8 except where they became unavailable to the agency.

This, however, is only one side of the problem. Of no less importance is the need to insulate the hearing officer from unauthorized contacts with one of the parties. Section 5(c) of the Administrative Procedure Act provides that no hearing officer is to consult any person or party on any fact in issue except upon notice and opportunity for all parties to participate. The hearings held under sections 7 and 8 are to be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed by agency officials engaged in the performance of investigative or prosecuting functions. Attempts by agency counsel or employees to influence decisions in which they are interested are likewise precluded. Nor can such personnel participate in the work of the review section of the agency after the initial or recommended decision of the examiner. The views of officials who investigated and prosecuted the case (or a factually related case) can now be presented to the hearing examiner and to the agency heads only in the public

proceedings. (See Attorney General's Manual on the APA, 50, 54, 56).

Internal separation such as is provided for in the Administrative Procedure Act, though undoubtedly of value as far as it goes, deals with the problem largely at the level of initial or recommended decision. Section 5(c) expressly states that it is not "applicable in any manner to the agency or any member or members of the body comprising the agency." The question of the minority of the Attorney General's Committee ("Can there be a practical separation of prosecuting and deciding functions where both are subject to one ultimate authority?" Report, 208) is left unanswered. True, some effort is made to minimize this situation by the provisions for examiner independence of the agency. But ultimate decision still rests within the agency, which also exercises general supervision over investigation and prosecution.

Taft-Hartley Act. In one particular field of Federal activity, the problem of separating functions is worthy of special notice. Under the Wagner Act of 1935, the National Labor Relations Board was a unified organization, with three Board members at the head and the General Counsel, as well as other operating officials, completely subject to them. The Board was vested with statutory authority to prevent designated unfair labor practices and to determine employee representation for purposes of collective bargaining. Under the Act of 1935, the NLRB was both prosecutor and judge in unfair labor practice cases. The decisions as to which unfair practice charges should be prosecuted were made by regional directors who were directly subordinate to the Board; when an unfair practice complaint was is-

sued, the Board ultimately made the findings of fact and conclusions of law with respect to the existence of the unfair practices charged.

As early as 1940, the Special Committee of the House of Representatives to Investigate the NLRB proposed a complete separation of the prosecutive and judicial functions similar to that which had been urged by the President's Committee on Administrative Management. "There is no criticism of the Board," the House Committee asserted, "that has been more consistent on the part of litigants and the courts, than the failure to separate its administrative and judicial functions, which separation is the very cornerstone of our whole democracy."

The provisions of the Administrative Procedure Act relative to separation of functions, which have been discussed above, did not have a great effect upon the procedures of the NLRB, for the Board had already, in some measure at least, provided for an internal separation such as is contemplated by the APA. However, some persons regarded such voluntary internal separation of functions as inadequate.

To meet this alleged inadequacy of the separation of functions, section 3(d) of the Labor Management Relations Act of 1947 was adopted. It provides that:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the in-

vestigation of charges and issuance of complaints * * * and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

In addition, under section 4(a), the Board

"may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed . . . by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations."

This abolished the Review Division of the Board. The members of the Board are now expected to do their own deciding, not permitting trial examiners to attend executive sessions of the Board to defend their reports as had been done in the past (House Report No. 245 on H. R. 3020, 80th Cong., 1st Sess., 25).

These provisions of the Taft-Hartley Act provide, in effect, for the complete separation of the functions of prosecuting and adjudicating within the NLRB. The Act does this by setting up the independent office of General Counsel, who has general supervision of NLRB attorneys and regional offices. He "is to have the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the

Board" (House Conference Report No. 510, on H. R. 3020, 80th Cong., 1st Sess., 37). As stated by the sponsor of the Act in the House, "it creates a general counsel who shall be independent of the Board and on all complaints by employees the counsel shall be the investigator and prosecutor, and the Board itself will be merely a quasi-judicial board passing on the case as presented by the counsel" (93 Cong. Rec. 6540).

Under the Act, the General Counsel is given two basic functions: (1) To determine whether, when, and upon what basis unfair labor practice charges shall be prosecuted. He is the final authority in all such matters, and (2) to supervise attorneys (except trial examiners and legal assistants to Board members) and regional office employees. He is also given certain other substantial enforcement powers by agreement with the Board.

As was aptly pointed out by the Hoover Commission Task Force Report on the Independent Regulatory Commissions, any attempt to appraise the organization of the NLRB under the Taft-Hartley Act is difficult at the present time. This is due in large part to the still limited experience under that Act. Thus far, the work of the Board and General Counsel has been mainly exploratory and the structures and methods have not yet hardened into final forms. Though it is consequently difficult as yet to make a full evaluation of the NLRB organization prescribed by the Taft-Hartley Act, it is possible to present some of the leading viewpoints upon the problems involved.

A strong statement in favor of the separation of functions provisions of the Taft-Hartley Act was made by the Joint Committee on Labor-Management Relations during the 80th Congress:

"The separation of the prosecution and judicial functions of the NLRB has promoted more public confidence in that agency and enabled it to carry out its duties with greater cooperation from the litigants who appear before it.

"The committee has found that the separation of the prosecution and judicial functions of the Board has accomplished many desirable results. * * *

"Almost without exception, the field office personnel have expressed unqualified satisfaction with the status given them by the act. Their contact with the union representatives, employers, and the general public, is a daily one. Most of them served the agency under the Wagner Act, when all of their activities were in the behalf of labor organizations. They investigated and processed cases knowing that if they incurred the disfavor of the unions in their region they might expect a transfer. In the eyes of most employers, some union representatives and a large part of the general public, NLRB employees operated as an adjunct of the labor-union movement; servants of an agency which was grand jury, prosecutor, and judge of an employer's relations with his employees.

"Under the Taft-Hartley Act they serve on the staff of the general counsel investigating and prosecuting a case against an employer on behalf of a union one day, while the next day may find them just as actively processing a case against that same union on behalf of an employer or an employee. They have found that they can do so without incurring the enmity of either group. They are now public servants."

There have, however, been cogent arguments presented on the other side. Some of the strongest attacks on the Taft-Hartley type of organization have stemmed from the feeling that the Congress has singled out the NLRB alone among federal agencies and barred the use by it of an administrative

procedure followed by other well-established agencies.

Perhaps the greatest criticism of the separation of functions provisions of the Taft-Hartley Act has been directed against the powers vested in the General Counsel with regard to the issuance of complaints. This Act, said Senator Humphrey, gives him "almost dictatorial powers, and I think that is the No. 1 abuse of this Act." Reference is apparently made here to the absolute authority of the General Counsel in determining whether or not a complaint shall issue, since he has the same relation to the Board that a District Attorney has to a court.

Other arguments against the separation of functions under the Taft-Hartley Act are based upon the assumption contained in the President's veto message of June 20, 1947, that it invites "conflict" between the NLRB and its General Counsel. That such conflict has occurred cannot be denied. (See, *e. g.*, Local 905, Retail Clerks Assn.-A-1 Photo Service, 83 N. L. R. B. 564, May 13, 1949).

From the point of view of public confidence in the impartial administration of justice by the NLRB, the Taft-Hartley separation of functions provisions appear to have had a most salutary effect. Recently, a proposal by the President, pursuant to the Reorganization Act of 1949, to abolish the present complete separation of functions was rejected by the Senate.

SUPREME COURT

Delegation of powers. In *United States v. Shoreline Cooperative Apartments*, 338 U. S. 897 (1949), the local option provisions of

the Housing and Rent Act of 1949 had been held unconstitutional by the district court as delegating the war powers of Congress to states and municipalities without setting up standards or rules for their guidance. The Supreme Court reversed in a memorandum decision, citing *Woods v. Miller Co.*, 333 U. S. 138 (1948). It is to be regretted that the Court did not see fit to articulate the bases of its decision. The statute at issue in the *Miller* case did not contain the features which the district court deemed objectionable in the instant case. The reliance upon the *Miller* decision does, however, indicate that the instant delegation is sustained under the war power. Certainly there is as much room for legislative leeway here as exists when Congress is acting with the President on foreign affairs matters. See *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936).

Investigatory powers. *United States v. Morton Salt Co.*, 338 U. S. 632 (1950), appears destined to become a leading case on the power of administrative agencies to procure information needed by them to carry on their assigned duties. The case arose out of a proceeding under the Federal Trade Commission Act which had culminated in a cease and desist order against respondents. The Court of Appeals had affirmed the order and commanded compliance. The decree directed that reports of the manner of compliance be filed with the Commission within ninety days, and such reports were filed and accepted. Some four years later, the FTC ordered additional and highly particularized reports to show continued compliance with the decree. Upon respondents refusal to furnish the additional reports, this suit was commenced seeking mandatory injunctions commanding respondents to

report as directed. The lower courts had dismissed for want of jurisdiction. The Supreme Court reversed.

The opinion dealt, first, with the argument that the FTC was invading the province of the judiciary. The Commission, said Justice Jackson, could affirmatively satisfy itself that the decree was being observed, in view of its residual duty of enforcement. The claim of usurpation of the courts' function was answered by consideration of the fundamental relationship between the courts and administrative bodies. The investigative function of an agency like the FTC was seen to be wholly different from that of the courts and its power to inquire not at all dependent upon court decree. Nor does the fact that the agency concerned may be engaging in a "fishing expedition" to see what it can turn up necessarily change the result in a given case. Compare *Ellis v. Interstate Commerce Commission*, 237 U. S. 434 (1915). "Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry." And, in an analogy fraught with significance, the administrative power of inquisition was likened to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. In the remainder of the opinion the Court rejected the claims that the Commission had violated §§3(a) and 6(b) of the Administrative Procedure Act, that its action was *ultra vires* the FTC Act, and that it transgressed the Fourth and Fifth Amendments.

Notice and hearing. The Civil Aeronautics Act empowers the CAB to issue certificates of convenience and necessity "authorizing the whole or any part of the transportation covered by [an] application." In *CAB v. State Airlines*, 338 U. S. 572 (1950), the Court refused to read this language as showing a congressional purpose to bar the Board from granting any certificates in which the routes awarded deviate from the precise routes defined in the application. The Board had granted a certificate for certain routes to intervenor and had denied the application of petitioner, although the routes awarded differed markedly from those sought by intervenor. Petitioner claimed that since intervenor had filed no application for the particular routes certified, it failed to have sufficient notice that the Board might consider intervenor as a competing applicant, and it thus failed to produce available evidence and arguments to discredit intervenor's fitness. The Court refused to invalidate the Board's action on this ground, in view of the Board's granting of a limited rehearing on the point after issuance of the order. Justices Reed and Frankfurter, dissenting, asserted that the fact that petitioner knew of the award of the route to intervenor in time to apply for a rehearing did not justify the failure of the Board to give it an opportunity to contest fairly for the selected route before the Board's opinions crystallized.

United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537 (1950), dealt with the question of whether the United States could exclude without hearing, solely upon a finding by the Attorney General that her admission would be prejudicial to the interests of the country, the alien wife of an honorably discharged veteran. The Court, in a

four-to-three decision, answered the question in the affirmative. The problem was treated primarily as one of statutory interpretation, for Congress could clearly grant the power to exclude without a hearing. "There is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty." Under the relevant statute, the War Brides Act of 1945, an alien spouse within its scope is to be allowed to join her citizen husband "if otherwise admissible under the immigration laws." It was upon this phrase that the Court based the validity of the instant executive action, on the ground that it incorporated in the act the power of the President under a 1941 amendment to the immigration laws to impose restrictions on the entry of persons during the national emergency. Among the regulations issued pursuant to the 1941 amendment was one providing that the Attorney General could deny an alien the hearing before a board of special inquiry to which he would otherwise be entitled where he determined that the alien was excludable on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest. It was under this regulation that petitioner was excluded and denied a hearing.

One wonders whether the Court in the instant case was not following an unduly narrow approach in construing a statute intended by Congress to confer a privilege of such significance upon the person. As Justice Frankfurter, dissenting, pointed out, "It is true also of Acts of Congress that 'The letter killeth.' Legislation should not be read in such a decimating spirit unless the letter of Congress is inexorable." In his view, such a substantial contradiction

of the Congressional beneficence which is at the heart of the War Brides Act ought not to be attributed to Congress by a process of elaborate implication. Justice Jackson went even further in his dissent, asserting that "the menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institution inherent in procedures of this pattern."

Sanctions. The FCC renewed a radio license only after petitioner carried out a required repudiation of a contract with respondents. The Commission had determined that, unless the contract were given no further effect, a renewal of the license would not be in the public interest. Respondents brought an action in a Georgia court to recover amounts due under the contract and were awarded judgment. The Supreme Court upheld the judgment of the state court in *Regents of the University of Georgia v. Carroll*, 338 U. S. 586 (1950).

The FCC order was held to constitute no defense in such an action. The regulatory power of the FCC centered around the grant of licenses. The Commission's powers were limited to those involved in refusing or revoking licenses. It could not affect the rights of third persons under a contract. The result may appear hard on the licensee, who is subject to a legal action if he complies with the FCC order and loses his license if he does not. This dilemma, says Justice Black, is the inevitable result of the statutory scheme, under which the Commission has at its disposal only the cumbersome penalties of license refusal and revocation.

Finality. In *United States v. Moorman*, 338 U. S. 457 (1950), the Court dealt with a government construction contract provid-

ing that in contractual disputes the decisions of the Secretary of War or his authorized representative should be final and binding. Notwithstanding this provision, the Court of Claims had awarded a money judgment on a claim which had been rejected by the representative of the Secretary. The Supreme Court reversed. Contractual provisions such as these are clearly valid, said Justice Black, in the absence of statutory prohibition. Nor should such provisions be frustrated by judicial assertion of authority to "interpret" contracts. The intent of the parties for finality of administrative determination is stated in language as plain as could be used. One should compare the approach of the Court here with that which it would follow in a case not involving a government contract. In other cases, provisions for administrative finality are not literally construed. See, e. g., *Kristensen v. McGrath*, 179 F. 2d 796 (App. D. C. 1949).

Primary jurisdiction. *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), was an action brought in a New York court by plaintiff railroad for a declaration that crew callers in a certain yard office of plaintiff, and the position held by them and the work assigned to them by plaintiff, were within plaintiff's collective bargaining agreement with a clerks' union and not within plaintiff's agreement with defendant telegraphers' union. Defendant union made a motion to dismiss, urging that the New York court had no jurisdiction to entertain the action and that plaintiff's recourse was to pursue its administrative remedy under the Railway Labor Act. The New York Court of Appeals held that defendant's challenge to the jurisdiction of the court must fail, for the case involved a dispute concerning the interpretation or application of a

collective bargaining agreement and, in such a case, the statute provides that the dispute "may be referred" to the Railroad Adjustment Board. This, said the New York court, indicates that such submission to the Board is not mandatory and that the jurisdiction of the Board is thus not exclusive. 87 N. E. 2d 532 (N. Y. 1949).

On certiorari, the Supreme Court reversed, relying on *Order of Ry. Conductors v. Pitney*, 326 U. S. 561 (1946), where the Court held that federal courts should not interpret carrier-union collective agreements prior to interpretation by the Adjustment Board. The reasoning of that case applies as well to actions brought in the state courts. Justice Black emphasized the paramount importance of having the Adjustment Board adjust grievances and disputes, stating that the "jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive." It was consequently error for the New York court to uphold a declaratory judgment interpreting these collective bargaining agreements.

A strong dissent by Justice Reed asserted that the primary jurisdiction doctrine was inapplicable in a case like this. "Congress surely would not have granted this exclusive primary power to adjudicate contracts to a body like the Board. It consists of people chosen and paid, not by the Government, but by groups of carriers and the large national unions. . . . When an administrative body varies so markedly from the kind which experience has shown may safely be given final power over people's rights, it should not be assumed that Congress intended the primary jurisdiction of the Board to be exclusive."

Judicial review. In *NLRB v. Mexia Textile Mills*, 70 S. Ct. 826 (1950), the Court, through Justice Clark, held that questions concerning subsequent compliance by an employer with a Board order directing the employer to cease and desist from its refusal to bargain in good faith with a union could not properly be considered by the Court of Appeals in connection with the Board's petition to validate such order. Nor does the fact that the employer asserted that the union no longer had a majority status and moved to adduce additional evidence to substantiate this claim change this result. The authority to raise the question of diminution in membership in the certified union is vested exclusively in rival unions. In a companion case, the Court reached a similar result, although the Board had waited two and one-half years before it sought "enforcement" of its order. *NLRB v. Pool Mfg. Co.*, 70 S. Ct. 830. Justices Frankfurter and Jackson dissented.

Hearing officers under APA. In *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950), the Court held that a deportation hearing had to be held before an examiner appointed under section 11 of the Administrative Procedure Act. In so doing, the Court, in effect, interpreted the Act so as to make its adjudicatory procedural requirements applicable in every case where a hearing with a decision on the record is *required by law*. Yet, as Justice Jackson recognized, the APA does not apply to every agency hearing. According to him, there are still exempted from the requirements of the APA "hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation."

(This case was reported in full in the February issue of the Bulletin, Vol. 2, No. 3.)

PROCEDURE ACT CASES

Applicability. Petitioners sought to annul decisions of the Tax Court on the ground that the opinions did not sufficiently set forth a complete statement of the findings, conclusions, and reasons or basis thereof on all material issues of fact and law as required by section 8(b) of the APA. The court held that section 8(b) had no application to the procedure of the Tax Court. *Cohen v. Commissioner*, 176 F. 2d 394 (10th Cir. 1949). It can, indeed, be asserted that the Tax Court is a "court" within the exclusionary meaning of section 2(a) of the APA and hence wholly outside the APA, although the instant court expressly did not find it necessary to decide that point.

In *Hiatt v. Compagna*, 178 F. 2d 42 (5th Cir. 1949), the court stated that the APA has no application to the procedures of the Parole Board. The full dress procedure it requires would render it practically impossible for the Board to handle its business.

The Administrative Procedure Act has also been held to be inapplicable to the proceedings of a Good Time Board at a federal penitentiary in proceedings to revoke a prisoner's good time allowance because of an alleged violation of prison rules. *Lesser v. Humphrey*, 89 F. Supp. 474 (M. D. Pa. 1950).

Right to counsel. *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949), involved a proceeding to enforce a subpoena of a special agent of the Bureau of Internal Revenue requiring defendants to testify in an investigation of the tax returns of a corporate taxpayer. Defendants had declined to testify unless their attorneys were present and con-

tended that section 6(a) of the APA granted them the right to counsel in such proceedings. The court agreed, rejecting the government's argument that the proceeding was investigatory, in nature analogous to grand jury proceedings and with the same need for secrecy. The APA, said Judge Smith, was intended to establish uniform standards of fairness for the dealings of administrative bodies with the citizen. Where two interpretations are possible, one of which would narrow, the other broaden, the categories of citizens touched by the administrative process to which protection is extended, the court should prefer the broader interpretation.

Subpoenas. According to the Court of Appeals for the Fifth Circuit, section 6(c) of the APA does not change the rule of *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946), that a defense based upon lack of jurisdiction in the agency to conduct the proceeding in which a subpoena is issued cannot be asserted in a subpoena enforcement proceeding. Congress, says Judge Holmes, intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena. *D. G. Bland Lumber Co. v. NLRB*, 177 F. 2d 555 (5th Cir. 1949). For a similar decision, with no mention of the APA, see *Hamilton v. NLRB*, 177 F. 2d 676 (9th Cir. 1949). The holding of the *Bland* case bears out the assertion of the Attorney General that section 6(c) was intended to state the existing law with respect to the judicial enforcement of subpoenas. APA, *Legislative History*, S. Doc. 248, 79th Cong. 227, 415. On the other hand, it can be argued that that section did change the rule of the *Oklahoma Press* case. As stated by Representative Walter, during the proceedings in

the House, the term "in accordance with law" as used in section 6(c), "does not mean that a subpoena is valid merely because issued with due formality. It means that the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena are directed are within the jurisdiction of the agency which has issued the subpoena." *Id.*, 363.

Decision process. In *NLRB v. Dixie Shirt Co.*, 176 F. 2d 969 (4th Cir., 1949), after the hearing, the Board had relieved the trial examiner from further participation in the case and directed a new examiner to prepare the intermediate report. The change was based upon the first examiner's request to be relieved on the ground of disqualification. Section 5(c) of the APA, providing that the recommended or initial decision be made by the officer who presided at the hearing except where such officers become unavailable to the agency, taken together with the provision in section 7(a) permitting examiners to withdraw if they deem themselves disqualified, was held to authorize the procedure followed in this case.

The "proposed decision" procedure of the FCC has been held to satisfy section 8 of the APA in *Western Union Division v. United States*, 87 F. Supp. 324 (D. C. 1949). The court stated that the APA requirement of issuance of a "tentative decision" was met by the Commission's issuance of a "Proposed Report" in lieu of a recommended decision by the presiding officer who conducted the hearing.

In *NLRB v. Universal Camera Corp.*, 179 F. 2d 749 (2d Cir. 1950), Judge Learned Hand dealt with the question how to treat a reversal by the Board of a finding of one of its own examiners. Under section 8(a)

of the APA, "on appeal from or review of" the decision of the officer who has presided at the hearing, "the agency shall . . . have all the powers which it would have in making the initial decision." "It is clear," says Judge Hand, "that these words apply to the decisions of the 'agency' upon the evidence; but nothing is said as to what effect the 'agency' must give to the 'officer's' findings; except that, if the text be read literally, it could be argued that the 'agency' was to disregard it." The decision concludes: "We hold that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in the court's own decision." Compare *C. E. Hall & Sons v. United States*, 88 F. Supp. 596 (D. Mass. 1950).

Judicial review. According to Chief Judge Sweeney, the APA is merely declaratory of the existing law of judicial review. Neither the APA nor the Declaratory Judgments Act gave the district court jurisdiction of an action by a naval yard veteran employee under the Veterans' Preference Act for a judgment declaring his right not to be demoted. *Brisbois v. Hague*, 85 F. Supp. 13 (D. Mass. 1949). Although Judge Sweeney's statement on the effect of the APA seems too broad, the result in the case appears to be supportable on the ground that the act complained of did not constitute "agency action" within the meaning of section 2 of the APA. It is only "agency action" that is reviewable under section 10.

The decision of the Third Circuit in *United States ex rel. Trinler v. Carusi*, 166 F. 2d 457 (3d Cir. 1948), that a deportation order is directly reviewable under section 10

of the APA has been followed by the Court of Appeals for the District of Columbia in *Kristensen v. McGrath*, 179 F. 2d 796 (App. D. C. 1949). The court held that, since deportation orders have always been subject to review by habeas corpus, they are not included in the APA's exception applying to cases where statutes preclude review. This is true although the Immigration Act provides that the decision of the Attorney General "shall be final." "Such a statutory declaration of finality, which has not precluded review by way of habeas corpus . . . can hardly qualify as a bar to review under the statute." But compare *Prince v. Commissioner*, 87 F. Supp. 53 (N. D. Ohio 1949), where judicial review of deportation cases under the APA was held to be precluded as agency action committed by law to agency discretion.

The Alien Property Custodian's refusal to return to a United States citizen remaining in Germany property seized during World War II has been held not subject to judicial review under the APA on the ground that review was precluded by the enabling statute. *McGrath v. Zander*, 177 F. 2d 649 (App. D. C. 1949).

A Presidential Proclamation establishing a game preserve pursuant to the Migratory Bird Treaty Act has been held to be "agency action committed to agency discretion" and therefore not subject to review under section 10 of the APA. *Lansden v. Hart*, 180 F. 2d 679 (7th Cir. 1950).

According to Circuit Judge Sanborn, neither the APA nor the Taft-Hartley Act has made any material change in the scope of review of the orders of the National Labor Relations Board or in its functions as a trier of facts. The decision of the Board is like that of a jury, which, on ap-

peal, may be set aside only if unsupported by substantial evidence. *NLRB v. Minnesota Min. & Mfg. Co.*, 179 F. 2d 323 (8th Cir. 1950).

Evidence. The mere admission of irrelevant or incompetent evidence at a hearing before a CAB examiner has been held not to constitute reversible error. The requirement of section 7 of the APA that no order shall issue except upon consideration of the whole record and "as supported by and in accordance with the reliable, probative and substantial evidence" means that where there is reliable, probative, and substantial evidence, any findings, conclusions and orders based thereon will be sustained even though unreliable, non-probative, and unsubstantial evidence was allowed in by the examiner. *Sisto v. Civil Aeronautics Board*, 179 F. 2d 47 (App. D. C. 1949). Under section 7 of the APA, an administrative hearing is thus to be compared to an equity proceeding in the courts, and the mere admission of evidence cannot be taken as prejudicial error. *APA, Legislative History*, S. Doc. 248, 79th Cong., 270 (1946). For a similar holding, with no mention of the APA, see *United States ex rel. Kataliakos v. Jordan*, 179 F. 2d 422 (7th Cir. 1950).

Hearing officers. The Immigration and Naturalization Service has decided that a hearing on an alien's application for an adjustment of status, requested pursuant to section 4 of the Displaced Persons Act of 1948, comes within the exemptions mentioned by Justice Jackson in the *Wong Yang Sung* case, 339 U. S. 33, summarized above. There is no requirement of a hearing imposed in such case, by either due process or the enabling statute. The hearing that is held is provided only by the agency regula-

tions as an administrative expedient in handling applications for adjustment of status. *Immigration & Naturalization Service, File No. A-6815891*, 18 U. S. Law Week 2497 (April 17, 1950).

Even where a hearing is required by law in connection with decisions of the Immigration and Naturalization Service, one should distinguish between deportation proceedings, such as the one involved in the *Sung* case, and alien exclusion proceedings, for the purpose of determining whether the particular hearing must be held before hearing examiners appointed under section 11 of the APA. With regard to deportation proceedings, the *Sung* case requires the appointment of an examiner under the APA. *United States ex rel. Saclarides v. Shaughnessy*, 180 F. 2d 687 (2d Cir. 1950), indicates that the same is not true of exclusion proceedings. Such proceedings, according to Judge Chase, can still be conducted before boards of special inquiry (expressly provided for by section 17 of the Immigration Act of 1917 to determine exclusion cases), for such boards come within the saving clause of section 7(a) of the APA as "boards . . . specially provided for by or designated pursuant to statute."

OTHER FEDERAL CASES

Notice and hearing. A quasi-judicial type hearing is not required as a matter of due process to the dismissal of a civil service employee suspected of disloyalty to the United States, according to the Court of Appeals for the District of Columbia. "It has been held repeatedly and consistently," says Judge Prettyman, "that Government employ

is not 'property' and that in this particular it is not a contract. We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. So much that is clear would seem to dispose of the point. In terms the due process clause does not apply to the holding of a Government office." *Bailey v. Richardson*, 182 F. 2d 46 (App. D. C., March 22, 1950).

The fact that the National Mediation Board has made a craft or class determination upon which the certification of a representative for collective bargaining would be based without notice to the minority union or individual employees does not violate due process. The craft or class determination does not affect "property" within the meaning of the Fifth Amendment. It is but an administrative and preliminary incident to the power of the Board to resolve controversies concerning the right of employees to determine who shall be their collective bargaining representative. Since the Board, by a mere craft or class determination, could not occasion a deprivation of appellants' property, no notice of intention to make such a determination was constitutionally necessary. *United Transport Serv. v. National Mediation Board*, 179 F. 2d 446 (App. D. C. 1949).

Service of notice by registered letter to each of the individuals who compose the partnership respondent in an NLRB proceeding has been held to satisfy the requirements of due process. *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (9th Cir. 1949).

An order of the Civil Aeronautics Board summarily suspending the registration of an air carrier operating as an irregular carrier was held to be invalid as denying due process in *Standard Airlines v. CAB*, 177 F.

2d 18 (App. D. C. 1949). "In our jurisprudence," Judge Prettyman asserted, "an opportunity to present contentions orally, with whatever advantages that method of presentation has, is one of the rudiments of fair play required when property is being taken or destroyed." The instant opinion was delivered a month prior to that of the Supreme Court in *FCC v. WJR*, 337 U. S. 265 (1949, which limited the right of oral hearing as a matter of due process. Later, in *American Broadcasting Co. v. FCC*, 179 F. 2d 437 (App. D. C. 1949), the same court considered the question once more. In that case, there was a petition by a broadcasting station licensee for reconsideration of a grant by the Commission, allegedly without hearing, to another station of facilities which it was asserted by petitioner would cause objectionable interference beyond its normally protected contour. The Commission denied the petition for reconsideration after its consideration on a written submission only, i. e., without oral argument. The court held that the failure to accord oral argument could not be held to deny due process, asserting that a contrary contention was foreclosed by *FCC v. WJR*, 337 U. S. 265 (1949). It should be noted that, in the *WJR* case, the issue before the Commission was one of law only, arising from the allegations of the petition for reconsideration as if submitted on demurrer, whereas in the instant case issues of both law and fact were presented. But, says Judge Stephens, the guarantee of hearing implied in the due process clause applies as well to a hearing on issues of fact as to hearings on issues of law. Therefore, the ruling of the Supreme Court must be held to extend to both.

It would seem, however, that the decision

of the Supreme Court in the *WJR* case need not be construed to have so widespread an effect. Clearly the *WJR* decision should not be construed so as to authorize summary license suspension in a case where such suspension would in effect destroy the business of the private party. Compare *Radio Cincinnati v. FCC*, 177 F. 2d 92 (App. D. C. 1949); *KFAB v. FCC*, 177 F. 2d 40 (App. D. C. 1949). And a reconsideration of the *WJR* opinion indicates that it does not go so far as to imply that the right to be heard orally need not be afforded in *all* cases where the administrative function is such that due process requires notice and hearing in connection with its exercise. This is true despite Justice Rutledge's broad statement that "the Constitution does not require oral argument in all cases where . . . even substantial [questions of law] are raised." 337 U. S. at 276. As he himself pointed out in a later portion of his opinion, such generalizations are fraught with danger. "This is not a matter . . . for broadside generalization and indiscriminate application. It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them." *Id.* at 277.

The result in the *WJR* case can be explained on the basis of the particular facts involved. It may be concluded that *WJR* was not entitled to be heard orally because, under the facts of the case, it was not entitled to be heard at all as a matter of right. In *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239 (1943), better known as the *KOA* case, the Court had held that, under the Communications Act, a licensee who claimed that the

grant of an application for a license on the same frequency would cause objectionable interference with its own broadcast signal was entitled to be heard in opposition to the application. In the *WJR* case, the possibility of objectionable interference was not conceded. "Contrary to the situation here, in the *KOA* case the Commission's proposed grant of a new license concededly created interference against which the existing rules of the Commission protected the prior license of *KOA*." 337 U. S. at 280. In the *WJR* case, as is shown by the decision of the Court of Appeals upon remand, *WJR*'s petition "did not allege that, under the permissive provisions of the Regulations, it had applied for or been granted . . . protection beyond the normal contour area as prescribed by the Standards. It did not assert in its petition any threatened impingement upon that area. It is our view, therefore, that upon the allegations of its petition appellant showed no right to intervene in or be made a party to the *Coastal Plains* proceeding." 178 F. 2d 720, 721 (App. D. C. 1949). Since *WJR* did not even have the right to be made a party, it seems clear that it could be denied oral argument.

The *WJR* case thus did not hold that, where due process demands notice and hearing, the private party need not be heard orally. If the right to notice and hearing is to be a substantial right, it must mean that the party affected can present his evidence and arguments at an oral hearing. Compare *In re Duffy*, 18 U. S. Law Week 2441 (FCC, March 21, 1950) (existing radio station claiming that the grant of an application filed by a new station in the same area would cause it economic injury held not entitled to a hearing as a matter of right on the question of whether the asserted com-

petition would injure the public interest).

Evidence. An interesting opinion by Judge Wyzanski in *United States v. United Shoe Machinery Corporation*, 89 F. Supp. 349 (D. Mass. 1950), indicates that the relaxation of the evidentiary rules in administrative proceedings may lead to a similar relaxation in analogous judicial proceedings. The case involved a civil anti-trust action by the United States. Defendants had objected to the introduction of certain documents as hearsay. Judge Wyzanski, however, held that in such a case the trial judge is not required to exclude every type of hearsay evidence which would be excluded in other types of cases. This doctrine, said he, is

"required to achieve consistency in the application of the antitrust laws by the District Courts and by the Federal Trade Commission, and is essential if the task of finding the facts in governmental civil anti-trust proceedings is not hereafter to be taken entirely away from judges and entrusted exclusively to administrative agencies.

"It is difficult to imagine any satisfactory ground for deciding that evidence which is admissible before the Federal Trade Commission is inadmissible before a judge sitting without a jury in a civil anti-trust case brought by the Government. There is no difference between the substantive anti-trust law applied by the Commission and that applied by the Court. In a *civil* anti-trust case the Government has the unfettered choice of going before a Commission or before a court without a jury. The Commission's cease and desist order may in many cases be as drastic as the decree of a District Court, except for the one point that the District Court's decree unlike the Commission's order can be used as *prima facie* evidence in a private treble damage suit. 15 U. S. C. A. §16. The Commission's hearing officer may be no more experienced or skillful

than a District Judge in sifting the reliable hearsay from the untrustworthy hearsay. And the admission of hearsay evidence by a Commission undercuts just as effectively as the admission of hearsay evidence by a Court the fundamental objective of the hearsay rule—the opportunity to hear the witness under oath and to subject him to cross-examination.

“One other consideration deserves mention. Recent years have seen a marked increase in the number of social and economic controversies which have been removed from the courts to administrative agencies for adjudication. Since there is a widespread belief that administrative adjudication gives less security to private interests than does judicial process, *Ng Fung Ho v. White*, 259 U. S. 276, 285, 42 S. Ct. 492, 66 L. Ed. 938, many persons regret this trend. Yet the original demand for administrative adjudication was traceable, in part at least, to the unwillingness of courts to admit evidence which they allowed administrative agencies to receive and act upon. And that demand would be reinforced if the courts were to continue to say that in social and economic controversies where the remedy is not imprisonment, or fine, or damages but an order prescribing future conduct, a court sitting without a jury cannot receive hearsay evidence even though without statutory authority an administrative agency could do so. To preserve their own jurisdiction the courts must in this type of controversy relax the rigidity of the hearsay rule.”

Cross-examination. In a proceeding to enforce a cease and desist order of the NLRB, respondent employer contended that the Board had erred in refusing to permit him to question the principal witness for the Board as to his membership in the Communist Party. The court agreed that the Board should have permitted the asking of the question, for the purpose of affecting the credibility of the witness. Yet, “even

though it was error to deny the company the right to ask the witness on cross-examination whether he was a Communist, the error was a technical one, and it would be doctrinaire to say that it affected the final action of the Board in such a substantial and decisive manner that the order should not be enforced.” *NLRB v. Fulton Bag & Cotton Mills*, 180 F. 2d 68 (10th Cir. 1950). One wonders, however, whether in a case like this the proper procedure would not have been to remand the proceeding to the Board. If membership in the Communist Party did bear upon the credibility of the witness, then the actual effect upon credibility should be a question for the Board. Compare *NLRB v. Indiana & Michigan El. Co.*, 318 U. S. 9 (1943).

Sub-delegation. *Pennello v. United Mine Workers*, 88 F. Supp. 935 (D. C. 1950), involved an action brought by the Regional Director of the Fifth Region of the NLRB for injunctive relief pending final adjudication on charges of unfair labor practices. Respondents asserted that petitioner had no right to bring the action because section 10(j) of the National Labor Relations Act, as amended, provided that such action should be brought by “the Board”, and the NLRB had no authority to delegate such power to the local Regional Director. The court, however, held that such delegation was lawful.

In a proceeding to enforce subpoenas issued by an NLRB Regional Director, respondents contended that the Labor Act gave the power to issue subpoenas only to the Board or one of its members and that such power was not delegable. The Court of Appeals for the Seventh Circuit rejected this contention, holding that Congress did intend to grant to the Board the authority to delegate the power to issue subpoenas

even though the power was not expressly granted. *NLRB v. John S. Barnes Corp.*, 178 F. 2d 156 (7th Cir. 1949). Judge Swaim did not consider *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942), upon which respondents had relied, as controlling. The attempted differentiation of the *Cudahy* case may be arguable. The decision can, however, be justified on the ground that the *Cudahy* case no longer represents the view of the Supreme Court, in the light of the more recent decision of *Fleming v. Mohawk Co.*, 331 U. S. 111 (1947).

Primary Jurisdiction. Plaintiff, a charitable corporation devoted to the diffusion of religious knowledge, brought an action against defendant operator of a radio broadcasting station for an order requiring defendant to provide facilities for the broadcast of a religious sermon and for damages. Plaintiff's claim was predicated on the theory that it had a positive right, arising under the Federal Communications Act and enforceable in a federal court, to have its sermon broadcast by defendant. The court held the complaint subject to a motion to dismiss, saying that the enforcement of the Act and the development of the concept of public interest under the Act are entrusted primarily to the Federal Communications Commission. To hold that the Act was intended to create any vested rights in the making of any broadcast and to make such rights enforceable in the courts would limit the freedom of action of the Commission and thus defeat the successful operation of administrative enforcement. *Massachusetts Univ. Conv. v. Hildreth & Rogers Co.*, 87 F. Supp. 822 (D. Mass. 1949). Compare *Starke v. N. Y., C & St. L. R. Co.*, 180 F. 2d 569 (7th Cir. 1950) (action for judgment declaring seniority rights under collective

bargaining agreement entered pursuant to Railway Labor Act dismissed for lack of jurisdiction; exclusive jurisdiction to hear and determine plaintiff's grievance held to be vested in Adjustment Board).

The test in these cases, as stated by Judge Lynne, is "whether the controversy disclosed . . . involves only questions of law, soluble in the first instance by the courts, . . . or involves issues essentially of fact which call for the exercise of administrative discretion." An action by a motor carrier to enjoin a competitor from invading segments of transportation territory allotted to plaintiff was held to present questions of fact involving the transportation practices of defendant, which must be determined by the Interstate Commerce Commission before resort may be had to the courts. *Akers Motor Lines v. Malone Freight Lines*, 88 F. Supp. 654 (N. D. Ala. 1950).

On the other hand, in an action by the United States against a water carrier and an airline for an injunction under the Sherman Antitrust Act, it was held that the district court did not lack jurisdiction on the ground that the Civil Aeronautics Board had primary jurisdiction of the matters complained of. *United States v. Inter-Island Steam Nav. Co.*, 87 F. Supp. 1010 (D. Hawaii 1950).

CAB v. Modern Air Transport Co., 179 F. 2d 622 (2d Cir. 1950), involved an action by the Board for an injunction prohibiting defendant from engaging in air transportation and in activities as an air carrier in violation of the Civil Aeronautics Act and without appropriate authorization by the Board. Defendant contended that, under the primary jurisdiction doctrine, the court had no jurisdiction to enjoin its unauthorized regular service until the Board first

proceeded to take action to revoke its registration as an irregular air carrier. Judge Clark held that the primary jurisdiction did not apply to bar judicial relief. That doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of a rate or rule, but a violation of such rate or rule.

Availability of review. A petition for a declaratory judgment that an NLRB certification of a labor union as the collective bargaining representative of plaintiff's employees was void on the ground that the union had not filed the reports and non-Communist affidavits required by the Taft-Hartley Act has been held not to state a cause of action. Such certification is not reviewable until it becomes the basis for a final order by the Board to cease and desist from an unfair labor practice. This is true, says the court, even assuming that the Board acted unlawfully and without sufficient jurisdictional facts appearing. *Atlanta Metallic Casket Co. v. United Paperworkers*, 87 F. Supp. 718 (N. D. Ga. 1949). Compare *American Federation of Labor v. NLRB*, 308 U. S. 401 (1940); *Millis v. Inland Empire Dist. Council*, 144 F. 2d 539 (App. D. C. 1944).

In *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (App. D. C. 1949), a complaint seeking to restrain the Attorney General from designating the complainant as a subversive organization pursuant to an Executive Order of the President was dismissed on the ground that it did not present a justiciable controversy. The action complained of, said Judge Proctor, imposed no obligation or restraint upon complainant. It commanded nothing. It denied no authority, privilege, immunity, or license. It subjected complainant to no liability, civil

or criminal.

The same Court later reaffirmed its decision in the *Joint Anti-Fascist Refugee Committee* case, holding that a fraternal insurance company is not entitled to judicial review of the Attorney General's action designating it as subversive within the meaning of Executive Order 9835 which directed, as part of the government's employee loyalty program, that the Attorney General furnish the Loyalty Review Board with a list of "subversive" organizations. "The employment and discharge of its civil servants, and the establishment of terms and conditions which must be met by employees or applicants for employment, are internal administrative matters," says Judge Miller, "concerning which the United States is free to act as it pleases, without judicial compulsion or restraint at the instance of an outsider such as this company. When the Attorney General designated the insurance company as a subversive organization for the purposes of the Executive Order, he did no more than advise the executive department in that respect, as he had been directed to do. If he was mistaken as to the true character of the fraternal organization, no court can cause him to change his conclusion. The correctness of administrative advice cannot be reviewed by courts." *International Workers Order v. McGrath*, 18 U. S. Law Week 2437 (App. D. C., March 22, 1950).

An action by plaintiff union against the National Mediation Board to require the Board to set aside its determination designating certain unions as bargaining agents was held subject to a motion to dismiss in *United Transport Serv. v. National Mediation Board*, 179 F. 2d 446 (App. D. C. 1949). In *Switchmen's Union v. Board*, 320 U. S.

297 (1943), the Supreme Court had held that a certification of representatives for collective bargaining by the Board was not subject to judicial review, on the ground that the Railway Labor Act impliedly precluded review. It was contended in the instant case that the *Switchmen's Union* decision has been overruled by *Steele v. L. & N. R. Co.*, 323 U. S. 192 (1944). Judge Stephens stated that this contention was incorrect. The *Steele* case dealt with judicial protection of the minority of a craft or class against violation of the obligation of the statutory representative to represent the entire membership of the craft or class, not with judicial review of certifications of the Board. Judge Stephens does, however, imply that the *Switchmen's Union* doctrine does not apply where constitutional questions are raised. In the instant case, the complaint is held subject to a motion to dismiss since no valid constitutional issues are involved. Compare *Kirkland v. Atlantic Coast Line R. Co.*, 167 F. 2d 529 (App. D. C. 1948), holding that the APA has not changed the rule of the *Switchmen's Union* case.

An order of the FCC severing one application from consolidated proceedings pending determination of applicant's eligibility was held not to be subject to review under section 402(b) of the Communications Act. Neither grant nor denial of an application was effected by the order complained of. *Pauley v. FCC*, 181 F. 2d 292 (App. D. C. 1950).

According to the Court of Appeals for the Tenth Circuit, the Taft-Hartley Act has not changed the rule that the refusal of the NLRB to issue a complaint charging unfair labor practices is not subject to review by the courts. The 1947 Act vested in the General Counsel, not the Board, the power

and function of investigating charges and issuing complaints. Since no provision was made for review of the General Counsel's action by the courts, the same rule applies as it did to the Board's refusal to issue a complaint under the Wagner Act. *General Drivers v. NLRB*, 179 F. 2d 492 (10th Cir. 1950).

A statute providing for revocation of a teaching certificate by a Board of Education, without providing for an appeal to the courts, does not deny due process, according to Judge Parker. The mere fact that the statute is silent with regard to review does not mean that judicial review is precluded. In addition, Judge Parker implies that, even were all review precluded, the statute would not be invalid. "The idea that due process requires judicial approval of matters relating to the hiring or discharge of a public employee is one which has no foundation either in reason or authority." *Shirer v. Anderson*, 88 F. Supp. 858 (E. D. S. C. 1950).

Exhaustion of administrative remedies. In *Myers v. Bethlehem Corp.*, 303 U. S. 41 (1938), the Supreme Court had held that the rule requiring the exhaustion of administrative remedies before resort may be had to the courts must be followed even in a case where it is alleged that the agency concerned is acting without jurisdiction. In the *Myers* case, it should be noted, the private party claimed that the particular case did not come within the *statutory* jurisdiction of the agency. Does the doctrine of the *Myers* case apply as well to bar judicial intervention where the asserted lack of jurisdiction is based upon a claim of unconstitutionality?

The Court of Appeals for the Ninth Circuit has answered this question in the affirm-

ative in *Monolith Portland M. Co. v. RFC*, 178 F. 2d 854 (9th Cir. 1949). "The judicial determination even of constitutional issues", said Judge Goodman, "must await the exhaustion of prescribed administrative remedies." Cf. *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752, 775-76 (1947). Under this view, even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy is held to be a prerequisite to judicial relief. Such a result is not compelled by the doctrine of the *Myers* case. Even if one feels that that doctrine is essential to effective administration, one may still seek to limit its application to cases where *statutory* jurisdiction is questioned. As stated by the Massachusetts court, in a decision which expressly follows the holding of the *Myers* case insofar as statutory administrative jurisdiction is concerned: "Where an administrative board is created by or is acting under a statute that is violative of the Federal or a State Constitution . . . then one may challenge the jurisdiction of the board by invoking the aid of the courts and need not wait until the board has made a final order." *St. Luke's Hospital v. Commission*, 70 N. E. 2d 10, 12 (Mass. 1946). It is usually said that the *Myers* doctrine is necessary if the administrative process is adequately to carry out the tasks which the legislature has assigned to it. Otherwise, it is argued, the jurisdictional issue can be raised in most cases as a device to delay effective administrative action. But this surely does not apply with the same force where substantial questions of *constitutional* jurisdiction are involved. Such questions can normally be raised in but a relatively few cases. Once the constitution-

ality of a particular statute is upheld, those subject to the act can no longer raise that issue, much as they might wish to do so for the purpose of obstructing administrative efficiency. In addition, if the *Myers* doctrine is based, as it in large part is, upon the judicial hesitancy to act in a particular case without the aid of administrative *expertise* as expressed in a prior agency decision, then this, too, should not operate where constitutional questions are concerned. The considerations which lead courts to defer to administrative determinations in most cases do not apply to such questions. With regard to them, the advantages of *expertise* are normally with the judge rather than with the administrator.

A variation of the problem presented in the *Myers* case has come up in recent years in cases where it was claimed that the agency was not complying with the Administrative Procedure Act. Under the basic theory of administrative jurisdiction in Anglo-American law, agency action is *ultra vires* unless the procedures prescribed by the legislature have been followed in a particular case. In the federal field, among the procedural requirements which must be complied with are those contained in the APA. Two recent decisions dealt with the question of whether the normal exhaustion-of-administrative-remedies rule is applicable in a case where it is alleged that the agency concerned is not following the APA. In both cases, the private party sought injunctive relief to compel the agency to comply with the APA, but it was held that the doctrine of the *Myers* case barred the courts from acting. "Appellant's application for court held was premature. Courts are not authorized to interfere by injunction or declaratory judgment with the conduct of pend-

ing administrative proceedings." *Riss & Co. v. ICC*, 179 F. 2d 810 (App. D. C. 1950); *Goodyear Tire & Rubber Co. v. FTC*, 88 F. Supp. 789 (D. C. 1950). But compare *Eisler v. Clark*, 77 F. Supp. 610 (D. C. 1948).

For other recent cases on the exhaustion of administrative remedies, see *Woods v. Ginocchio*, 180 F. 2d 484 (9th Cir. 1950) (one need not proceed with *optional* administrative processes before seeking judicial relief); *Johnson v. Nelson*, 180 F. 2d 386 (App. D. C. 1950) (fact that administrative action is probably erroneous does not create exception to exhaustion rule); *Hunter v. Beets*, 180 F. 2d 101 (10th Cir. 1950) (administrative remedy must be followed even though it became effective after entry of judgment in district court); *Arguello v. Cross*, 88 F. Supp. 107 (N. D. Cal. 1950) (exhaustion rule applicable "although there may be merit" to the position taken by plaintiff that he is not within the coverage of the enabling statute). But compare *United States ex rel. DeLucia v. O'Donovan*, 178 F. 2d 876 (7th Cir. 1949) (asserting that the rule requiring exhaustion of administrative remedies does not apply when the administrative body has exceeded its statutory authority).

Finality. Action of the Administrator of Veterans' Affairs has been held not subject to review in *Slocumb v. Gray*, 179 F. 2d 31 (App. D. C. 1949). The decision is based upon the provision in the enabling Act (38 U. S. C. §705) which states that such action "shall be final and conclusive on all questions of law and fact, and no . . . court . . . shall have jurisdiction to review by mandamus or otherwise any such decision." The authority of Congress, in such a case, to withhold review is now beyond question, says the court. Veterans' benefits are mere

gratuities and Congress can confer them on any terms it wishes. The case thus turns upon the established distinction between so-called "benefits" or "gratuities" and "property" rights. In the former, review may be precluded by the enabling Act, and the instant decision is supported by many cases. *Wilson & Co. v. United States*, 311 U. S. 104 (1940); *International Union v. Bradley*, 75 F. Supp. 394 (D. C. 1948), and cases there cited. Cf. *Siegel v. United States*, 87 F. Supp. 555 (E. D. N. Y. 1949). *Quaere*: whether review would be available in a case like the instant case involving "benefits" under section 10 of the Administrative Procedure Act, if there were no statutory preclusion of review. Compare *Snyder v. Buck*, 75 F. Supp. 902 (D. C. 1948).

Scope of review. A valuable comparison of the scope of review of decisions of administrators, judges, and juries is contained in *Orvis v. Higgins*, 180 F. 2d 537 (2d Cir. 1950). (1) A general or a special jury verdict, says Judge Frank, must be sustained "when there is some evidence which the jury might have believed, and when a reasonable inference from that evidence will support the verdict, regardless of whether that evidence is oral or by deposition. (2) In the case of findings by an administrative agency, the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict. (3) Where a trial judge sits without a jury, the rule varies with the character of the evidence." It is only where the evidence supporting his findings as to any fact issue is entirely oral testimony, that his finding is entitled to weight similar to that given to administrators and juries. "It follows that evidence sufficient to support a jury verdict or an administrative finding may

not suffice to support a trial judge's finding. So in the instant case, perhaps, on the record evidence, we might have affirmed a jury's verdict or an administrative agency's finding in the plaintiff's favor."

The above indicates clearly that review of an administrative finding is narrower than review of the finding of a trial judge. As Judge Frank puts it: "A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's finding has far less respect because he is blessed neither with juror's inexperience nor administrative officers' expertness."

In a proceeding to enforce a cease and desist order of the NLRB, respondent employer asserted that the order should not be enforced because the unfair labor practice charge had been filed with the Board by a member of the Communist Party, whose purpose was to further the objects and designs of that Party. Hence, it was claimed, the Board was without jurisdiction, for its processes were being used for a purpose wholly alien to the policies of the National Labor Relations Act. The court, however, held that even if the assertion of respondent was true, it did not bear upon the jurisdiction of the Board. When the Board issues its complaint, the sole question is the truth of the accusation of unfair labor practices contained in it. The motives of the informer, no matter how evil or unlawful, do not deprive the Board of its jurisdiction to act. It is true that the question of whether the Board's processes were being subjected to abuse in this case was one that could

properly be considered. But this was a matter resting in the sound discretion of the Board. *NLRB v. Fulton Bag & Cotton Mills*, 180 F. 2d 68 (10th Cir. 1950).

In *NLRB v. La Salle Steel Co.*, 178 F. 2d 829 (7th Cir. 1949), the Board had held the existence of a nonsolicitation rule to be the basis of a presumption that the employer was violating the National Labor Relations Act. Respondent contended that, under Section 10(e) of the Taft-Hartley Act, the Board could no longer make a no-solicitation rule the basis of even a rebuttable presumption that the employer was violating the Act and the courts could not uphold a Board finding that such a rule violated the Act unless there was evidence to show that the rule was not necessary. The court held that this argument was without support in the cases decided since 1947. Regardless of what Congress might have intended, says the court, section 10(e) does not materially enlarge the scope of judicial review of the Board's findings of fact. While the Taft-Hartley amendment may mean that existence of the no-solicitation rule must be proved by "substantial evidence on the record considered as a whole" instead of just "substantial evidence", it cannot have the effect of altering the weight to be accorded the existence of the rule, once the fact is proved. Cf. *Republic Aviation Corp. v. Board*, 324 U. S. 793 (1945).

A similar approach to the review provisions of the Taft-Hartley Act is contained in Judge Learned Hand's opinion in *NLRB v. Universal Camera Corp.*, 179 F. 2d 749 (2d Cir. 1950). After a careful analysis of the cases dealing with the question, he states: "The most probable intent in adding the phrase 'on the record considered as a whole,' was to overrule what Congress

apparently supposed—perhaps rightly—had been the understanding of some courts: i. e. that, if any passage could be found in the testimony to support a finding, the review was to stop, no matter how much other parts of the testimony contradicted or outweighed it. . . . It appears to us that, had it been intended to set up a new measure of review by the courts, the matter would not have been so left at large. We cannot agree that our review has been ‘broadened’; we hold that no more was done than to make definite what was already implied.” Compare *NLRB v. Booker*, 180 F. 2d 727 (5th Cir. 1950); *NLRB v. Continental Oil Co.*, 179 F. 2d 552 (10th Cir. 1950), where the court stated that though Congress, by the Taft-Hartley Act, may have intended to broaden the scope of judicial review, “if it has such an intent, it failed in the result.” But compare the remarks of Judge Allen in *Pittsburgh S. S. Co. v. NLRB*, 180 F. 2d 731 (App. D. C. 1950).

In *Hudson River Day Line v. United States*, 85 F. Supp. 225 (S. D. N. Y. 1949), the substantial evidence rule was applied to limit the review of an ICC order granting temporary authority to a water carrier to operate as a common carrier in furnishing special charter service between certain points on the ground that there was an immediate and urgent need for such services. Plaintiff had argued that the question of urgency of the need was a judicial question, but the court held that it could not determine such question as a trier of fact, citing *Gray v. Powell*, 314 U. S. 402 (1941). The question at issue involved the application of a statutory term to a particular factual situation. Until recently, it might have been treated as a question of statutory interpretation, for the reviewing court to

decide. Since *Gray v. Powell*, however, such questions have been treated as questions of fact for purposes of review by the federal courts. But compare *Ohio Power Co. v. NLRB*, 176 F. 2d 385 (6th Cir. 1949), dealing with the meaning of the term “supervisor” in the Labor Act.

Jurisdictional findings. In *NLRB v. Lewis Motor Co.*, 180 F. 2d 254 (5th Cir. 1950), the substantial evidence rule was applied to limit review of the Board’s finding that respondent was subject to the National Labor Relations Act. But this is not a finding of fact; it is a jurisdictional finding, whose existence is a condition precedent to the lawful exercise of the Board’s power. Where administrative jurisdiction depends upon a particular finding, the reviewing court should be able to determine upon its own independent judgment whether or not that finding is correct. “The law is settled that where a jurisdiction is given to a tribunal in certain events, the jurisdiction only arises on the actual happening of those events. If they have not happened in fact, they cannot obtain jurisdiction by wrongly deciding that they have happened.” *Rex v. Local Government Board*, [1922], 2 I. R. 76.

Ultra vires. *Gardner v. Ewing*, 88 F. Supp. 315 (S. D. Ohio 1950), illustrates the power of the courts to set aside *ultra vires* administrative regulations. There the court held that a regulation of the Social Security Board imposed a duty not required by the enabling Act and, in effect, amounted to an administrative imposition of a condition precedent to recovery of insurance benefits in addition to that imposed by the Congress. In the course of its opinion, the court stated: “Where a statute empowers an administrative agency to make rules and regu-

lations and to establish procedures, not inconsistent with the provisions of the Act, which are necessary or appropriate to carry out such provisions and the statute imposes no sanctions or penalties for failure to comply therewith, such administrative agency may not provide that failure to comply with its regulations will result in the loss of rights conferred by statute."

Estoppel. *Gudgel v. Iverson*, 87 F. Supp. 834 (W. D. Ky. 1949) reiterates the familiar principle that the United States is neither bound nor estopped by the unauthorized acts of its officers or agents. There, a deputy market administrator's unauthorized interpretation of plaintiff as a handler rather than producer of milk within the meaning of a market order issued pursuant to the Agricultural Marketing Agreement Act was held not to be binding on the Secretary of Agriculture nor to estop the Government from enforcing an order issued by the Secretary against plaintiff as a producer.

STATE CASES

Primary jurisdiction. In *Ward v. Keenan*, 70 A. 2d 77 (N. J. 1949), the Supreme Court of New Jersey rejected the doctrine of *Myers v. Bethlehem Corp.*, 303 U. S. 41 (1938), under which the rule requiring the exhaustion of administrative remedies is applied even to cases where the administrative agency has to pass on the question of its own jurisdiction. "Where the question of jurisdiction depends, as it often does, on questions of fact, and where the Federal courts apply their version of the 'substantial evidence' rule, the ultimate benefits of judicial review of the question of jurisdic-

tion may be little more than *pro forma*," asserted Vanderbilt, C. J. "This point of view is at variance with the Rule of Law as enforced in this State." As stated by the Chief Justice, there are two exceptions in New Jersey to the exhaustion-of-remedies rule: (1) When the jurisdiction of the administrative agency is questioned on persuasive grounds, the challenging party should be allowed a judicial remedy before the administrative hearing for the obvious reason that, if the question of jurisdiction were resolved against the agency, the parties would be spared the vexation of a useless hearing. But compare *Petroleum Co. v. Public Service Commission*, 304 U. S. 209 (1938). (2) When the agency has jurisdiction but the charges asserted before it are so palpably defective that its jurisdiction is merely colorable, the courts may likewise intervene in advance of the administrative hearing.

Right to counsel. *Bancroft v. Board of Governors, etc.*, 210 P. 2d 666 (Okla. 1949), involved a disciplinary action before the Oklahoma Board of Governors of Registered Dentists. The court rejected the contention that respondent was denied due process when he was not furnished counsel in the hearing before the Board. In this sort of hearing, the private party is entitled to have counsel of his own choosing, but he has no right to be furnished counsel, even though he does not have funds with which to hire an attorney.

Constitutional fact. The doctrine of *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287 (1920), requiring a determination by the reviewing court upon its own independent judgment as to both law and facts when an administrative determination is attacked on constitutional grounds, has been

applied by the Supreme Judicial Court of Massachusetts in *Lowell Gas Co. v. Department of Public Utilities*, 84 N. E. 2d 811 (Mass. 1949). Justice Wilkins said that "the statement, that under G. L. (Ter. Ed.) c. 25, §5, this court cannot review or revise facts, has no application where constitutional rights respecting rates are involved. In such cases the statute must be understood to confer plenary equity jurisdiction." Inquiry by the court on the issue of confiscation is not confined to the findings of the agency or the evidence introduced before the agency. The Massachusetts Declaration of Rights guarantees to an owner, who alleges that confiscation of his property will result from a rate order, a fair opportunity for submitting that issue to a court for determination upon its own independent judgment as to both law and facts. Compare *Georgia Public Service Com'n. v. Atlanta Gas Light Co.*, 55 S. E. 2d 618 (Ga. 1949); *Staten Island Edison Corp. v. Maltbie*, 73 N. E. 2d 705 (N. Y. 1947). *Ben Avon* is thus still showing remarkable vitality for a supposedly defunct doctrine.

Notice of Hearing. In *Petition of Village Board of Wheatland*, 42 N. W. 2d 321 (N. D. 1950), the Supreme Court of North Dakota reversed an order of the State Public Service Commission requiring the Northern Pacific Railway to change its grades and to install signal devices in the Village of Wheatland. The basis for the ruling was the failure to follow the procedure prescribed by the State Administrative Agencies, Uniform Practice Law (NDRC 1943, c. 28-32, as amended by S. L. 1945, c. 218, 219). The court emphasized that the proceeding was not instituted before the Commission in accordance with the statutory scheme, and that the notice of hearing is-

sued by the Commission related only to the installation of electrical signal devices, whereas the Commission's order required the railroad to change its grades.

STATE LEGISLATION

The Committee on State Administrative Law of the Section of Administrative Law has recently summarized what has been taking place in the field of state legislative regulation of administrative procedure.

In three states, bills providing for the general regulation of administrative procedure were passed only to be vetoed by the governor. In each instance, the measures were prepared either by or with the active participation of bar association committees. Thus, in the fall of 1949, the legislature of Missouri passed and sent to the governor three bills, each dealing with a different segment of the problem of administrative procedure. Senate Bill 104 was known as the "Administrative Procedure Act of Missouri." This was a rather comprehensive procedural regulation applying to all "formal proceedings" (generally, proceedings where decisions are required to be made after hearing or are subject to judicial review on an administrative record) and supplemented an act passed in 1946 which was not intended to be a complete statute on administrative procedure. The proposed law, among other things, placed emphasis upon the making of a record to constitute the basis of review either by a court or by a higher administrative agency. Senate Bill 105 enlarged somewhat the scope of review in "contested cases" covered by the Act of 1946, while Senate Bill 106 dealt with the

authority of the reviewing court to hear evidence on the merits of the case and enlarged the power of the court to pass upon the facts. It contained a caution against the court undertaking to substitute its discretion for the discretion legally vested in the administrative body. It did not apply where there was other adequate provision for judicial review.

These measures had been prepared after some five years of study by committees of the Missouri Bar and represented conclusions reached after long and thorough consideration by these groups. They passed each house of the legislature by large majorities. However, they were vetoed by the governor on February 15, 1950. The veto message stated that the bills were opposed by all the administrative agencies affected by them. The governor expressed the opinion that the measures would greatly hamper the agencies in the conduct of their business and that they would adversely affect the rights of litigants through causing delay and needless expense.

In two other states, Oklahoma (House Bill 7, 1949 session) and Pennsylvania (House Bill 879, 1949 session) bills were passed by the legislatures only to be vetoed (in Oklahoma by a pocket veto and expressly in Pennsylvania). The Oklahoma Bill was based on the Model Act but contained numerous modifications designed to fit the local situation. It was largely the product of a research project under the direction of Professor Maurice H. Merrill of the University of Oklahoma. It was endorsed by the State Bar Association. The pocket veto is said to have been the result of objections that the measure, if adopted, would interfere with the purchasing functions of the State Board of Public Affairs.

The Pennsylvania bill was intended to amend and strengthen the act passed in 1945 (Administrative Agency Law, 71 P. S., 1710) which was based on the Model Act. It was vetoed by the Governor chiefly because of the objection of certain executive departments that its passage would impede them in the performance of their functions. The Administrative Law Section of the Pennsylvania Bar Association was actively concerned in the preparation of the bill and supported its enactment.

In Oregon, a bill was prepared with the assistance of members of a committee of the State Bar Association and was approved by the association in September, 1949. Since the Oregon legislature does not meet again until 1951, it is probable that further revisions will be made. In its present form the bill is a comprehensive measure covering both rule making and administrative adjudication and also containing provisions for judicial review. The latter provisions as finally approved by the bar association exclude hearsay evidence under certain circumstances and provide for a trial *de novo* before the court. The bill appears to derive material both from the Model Act and the federal Administrative Procedure Act.

Within the past two years an act generally regulating administrative procedure was introduced in New Jersey but failed of passage due in part at least to the opposition of affected agencies. The bill was reintroduced in the current session of the legislature. It is supported by the New Jersey Bar Association through its administrative law committee.

In five states and the District of Columbia committees of the various bar associations are actively engaged in the preparation of legislation regulating administrative pro-

cedure. In Virginia a draft of such a measure has been presented to the Virginia Legislative Advisory Council with a view to its introduction during the 1950 session of the legislature. It is reported that the bill is based on the Model Act. In Connecticut the Committee on Administrative Law has also been working on a proposal based on the Model Act. In Iowa the Board of Governors of the State Bar Association approved a draft of the Model Act in December 1948. The Board directed the Committee on Administrative Procedure to prepare a bill based on that act, conforming it to the situation in the state and have it introduced in the legislature. It is expected that such a bill will be introduced at the next session. In Massachusetts a subcommittee of the Committee on Administrative Law of the Boston Bar Association has been actively engaged in work in this field since May 1949.. The Arizona Bar Association in April endorsed a program looking toward procedural reform in that state. The Administrative Law Section of the District of Columbia Bar Association has appointed a committee to make a study and draft proposed legislation. It is estimated that two or three years will be required for the committee to complete its work.

In Texas a bill to appropriate \$25,000.00 for a study of state administrative procedure similar to that resulting in the Benjamin report was introduced with Bar Association support at the last legislative session but failed to pass.

Several states have had administrative procedure acts in operation for a number of years. While it is not necessary to comment on them in detail, one or two points should be mentioned. In Minnesota the statute (Minnesota Statutes, Secs. 15.042 *et*

seq.) covers only the adoption of rules and regulations, and publication. Experience under the act has been described as unfavorable. It is expected that a new bill will be ready for presentation to the legislature in 1951. In Ohio an administrative procedure act was drafted by a commission after a thorough study of the federal and various state acts and after a series of hearings (Ohio General Code Secs. 154-61 to 154-74). The rule-making sections, it is reported, were taken principally from the federal act and the other portions from various state acts. Experience under the act is described as favorable.

Probably the most significant conclusion to be derived from the foregoing material is that, although the bar associations have been doing extremely important work in this field, their efforts bear fruit slowly. It would seem that in order to secure effective regulation of state administrative procedure it will be necessary to go through a long process of education similar to that which preceded the enactment of the federal Administrative Procedure Act.

SECTION ACTIVITIES

Essay Contest. Announcement was made recently of the selection of six winners in the National Essay Contest conducted by the Section. Each of the three judges selected by the Council examined the manuscripts submitted by contestants who remained anonymous except for identification by number. Entries were submitted from 16 states and first place award was made to Mr. Frank E. Cooper of Detroit, Michigan. Second place was shared by two successful

contestants, Mr. Maurice H. Merrill of Norman, Oklahoma, and Mr. Ralph N. Kleps of Sacramento, California. Honorable mention was given to three contestants, Mr. Robert M. Benjamin of New York City, Mr. Kenneth K. Luce of Waukesha, Wisconsin, and Mr. Whitney R. Harris of Dallas, Texas. Awards will be made at the annual meeting of the Section to be held in Washington at the time of the meeting of the Association in September. The Section is indebted to the contest judges (Judge George Rossman, Dean Charles B. Nutting, and Mr. Carl McFarland) and to the co-chairmen of the Essay Contest Committee (Mr. Omar C. Spencer and Mr. J. Tyson Stokes).

Delegation to Section to represent ABA on proposals to amend Administrative Procedure Act. At its mid-year meeting in Chicago, the House of Delegates unanimously adopted a resolution empowering and directing that "the Section of Administrative Law, as the successor of the prior Special Committee on Administrative Law, by all necessary and proper means including appearances before legislative committees (1) preserve the gains made by the adoption of the Administrative Procedure Act as the law of the land, (2) develop and seek the adoption of improvements thereof as well as additional measures to like purposes. . . ." Shortly thereafter, the Section Chairman requested the Chairman of the Section's National Committee to

represent the Section and the Association in Congressional hearings on matters within the contemplation of the foregoing resolution. Responding to this request, National Committee Chairman C. A. Miller on April 24, 1950, submitted a statement to the Senate Committee on Expenditures in the Executive Departments objecting to certain of the Reorganization Plans on the ground that certain of the Plans, as written, could be construed to render section 11 of the Administrative Procedure Act inapplicable to the so-called independent agencies with which the Plans were concerned.

Annual Meeting. The current indications are that the Section's meeting in Washington in September will be the largest in its history. Except for the meeting of the Council on Monday afternoon, September 18, it is contemplated that the entire Section program will be completed in one day, Tuesday, September 19. In addition to the two business sessions, the Section luncheon will be held on that day also. Arrangements have been made to have all Section functions take place at the Mayflower Hotel. The Section luncheon is being planned as a collaborative affair sponsored jointly by the Section of Administrative Law, ABA; the Division of Administrative Law, Federal Bar Association; and the Section of Administrative Law, District of Columbia Bar Association. The detailed program will appear in a special issue of the Bulletin scheduled for distribution before September 1st.

